

# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 15

FEDERAL TRADE COMMISSION, PETITIONER

v.

MARY CARTER PAINT CO., ET AL.

**CN WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT**

## REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

The Commission is filing this brief in reply to respondents' contention that the decision in this case is irreconcilable with *Book-of-the-Month Club, Inc.*, 50 F.T.C. 778. Respondents' contention rests on a reading of the *Book-of-the-Month Club* decision which, for the reasons stated below, we believe to be erroneous.

1. On June 30, 1948, the Commission filed a complaint against the Book-of-the-Month Club, in which it charged that the Club had deceptively used the words "free" and "book dividends" in its advertising. The Commission alleged that these terms were misleading because "the books designated as 'free' or

as 'book dividends' are not gifts or gratuities or without cost to the recipient but on the contrary the prospective purchaser or purchasers, before he is entitled to receive such books, must join respondents' club thereby becoming obligated to purchase at least four books from respondents over the period of a year, the fulfillment of which obligation inures directly to the benefit of, and profit to, the respondents." Illustrative of this allegedly deceptive advertising were a folder and card representing as "free" the books received upon enrollment, the monthly magazine published by the Club, and the book-dividend given with the purchase of every two selections. 48 F.T.C. 1300-1302.

2. A hearing was held before a trial examiner, and the Commission in 1952 entered findings of fact. Findings 4 through 7 read as follows (48 F.T.C. at 1306):

Par. 4. The use of the word "free" to describe the "enrollment" book has tremendous advertising value in inducing people to sign and send in the membership coupon.

Par. 5. The use by the respondent of the word "free" is false, misleading, and deceptive. In truth and in fact, the books designated as "free" are not gifts or gratuities or without cost to the recipient but, on the contrary, the prospective member, before he is entitled to receive such books, must join the Book-of-the-Month Club and assume the obligation to purchase at least four books from respondent over the period of a year, the fulfillment of which obligation inures directly to the profit of the

respondent. Additional evidence of the fact that such books are not free is the fact that if a member does not purchase at least four books from the respondent within a year of his application for membership in the Book-of-the-Month Club, payment for the book theretofore designated as "free" is thereafter demanded by the respondent.

Par. 6. Respondent's advertisements have the tendency and capacity to deceive, and actually have deceived, members of the purchasing public into the erroneous and mistaken belief that books offered by respondents as "free to new members" are in fact given without charge or obligation to new members of Book-of-the-Month Club.

Par. 7. The compliant herein also charges that the respondent's use of the term "book-dividends" is false, misleading, and deceptive. The Commission is of the opinion, and so finds, that this charge is not sustained by the evidence.

3. The Commission's order directed the Club to cease and desist from (48 F.T.C. at 1307):

Using the word "free," or any other word or words of similar import or meaning, in advertising to designate or describe any book, or other merchandise, which is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring, directly or indirectly, to the benefit of the respondent.

4. Near the beginning of the Commission's accompanying opinion (written by Chairman Mead), the

Commission noted that "[t]he charge in the complaint with respect to respondents' use of the term 'book-dividends' is not sustained." 48 F.T.C. at 1308. The remainder of the opinion discussed only the advertisements aimed at "prospective subscribers" (48 F.T.C. at 1309), and noted that "[t]he *enrollment books* are either free or they are not free" (*ibid.*, emphasis added). The Commission's conclusion was substantially summarized in the following paragraph (48 F.T.C. at 1314):

In the present case it is clearly established by substantial evidence that the use of the word "free" in respondent's advertisements is a material representation describing the "enrollment" book; that the representation has tremendous advertising value in inducing prospective purchasers to sign and send in the membership coupon; that the representation is false, and not only has the tendency and capacity to mislead and deceive, but actually had deceived prospective purchasers into the erroneous and mistaken belief that the "enrollment" book offered by respondent as "free" would in fact be given without cost or other obligation. We are of the opinion that the acts and practices of the respondent are all to the prejudice and injury of the public, that the public is entitled to be protected against this species of deception, and that its interest in such protection is specific and substantial.

The Commission did not, in its opinion or fact-findings, otherwise discuss use of the word "free" with regard to the Club's book-dividend policy.

5. In ordering compliance with the Commission's order, the Court of Appeals for the Second Circuit summarized the relevant facts as follows (202 F. 2d 486, 488-489):

The crucial factor here is that the Book-of-the-Month Club typically publishes an advertisement which states in large print at the top, "Free \* \* \* to new members of the Book-of-the-Month Club" a copy of some designated book. This advertisement contains, at the bottom and in much smaller print, a coupon which, when signed and sent to the Club, constitutes a contract between it and its new "member"; this coupon states that he is to "receive free" the designated book, and that he agrees "to purchase at least four books-of-the-month a year from the Club." The evidence shows that the so-called "free book" is not, in fact, a gift: If the member fails to buy four books-of-the-month within a year after joining the Club, the Club demands and expects to collect from him the retail price of the "free" book, although sometimes the Club will relinquish this demand provided the "free" book is returned to it. \* \* \*

6. Subsequent to the decision in *Walter J. Black, Inc.*, 50 F.T.C. 225, the Commission in 1954 modified its order in the *Book-of-the-Month Club* case. 50 F.T.C. 778. It noted that the Club would, under the existing order, "be placed at an unfair competitive disadvantage with their competitors upon whom such an order would not now be imposed." 50 F.T.C. at 780. After stating the *Black* rule, the Commission observed that the respondents had violated even that



rule because "they did not clearly and conspicuously disclose in said advertising all of the conditions, obligations, or other prerequisites to the receipt and retention of the book referred to therein as 'free.' Specifically, the respondents did not disclose the fact, and that it was a fact is undisputed by the respondents, that if a member of the Book-of-the-Month Club failed or refused to purchase at least four books within a year after joining the club, payment for or the return of the book theretofore designated as 'free' would be required." 50 F.T.C. at 781. Consequently, the Commission entered an order substantially in the language of the *Black* rule.

Respondents assert repeatedly in this Court that the Commission's *Book-of-the-Month Club* decision permitted use of the word "free" to describe the Club's "book-dividend" policy of giving a third book with every two that were purchased (Resp. Br. 14, 22, 32, 33). This, respondents contend, is identical to their merchandising arrangement. Assuming, *arguendo*, that the Book-of-the-Month Club's "free book-dividend" policy is similar to respondents' "free can of paint,"<sup>1</sup> we do not believe an examination of the

<sup>1</sup> We do not believe that the two situations are the same. The books offered by the Book-of-the-Month Club had an established retail publisher's price for editions which were indistinguishable from—although not identical to—those offered by the Club. The Club could therefore say—just as the gasoline filling station would in the illustration at page 32 of our main brief—that the "dividend" book was "free" because it was a bonus added at no cost on the purchase of the identical product being sold by other vendors.

history of the *Book-of-the-Month Club* case bears out the suggestion that the Commission's 1954 decision constituted approval of the Club's use of the word "free" to describe its book dividends. On the contrary, although the initial complaint alleged that the word "free" was being deceptively used with respect to book dividends, the Commission's findings and opinion dealt exclusively with the enrollment offer. Respondents themselves have noted that the Commission "found that the like charge with respect to the 'free' book given with each two books purchased had not been sustained." Resp. Br. 4-5, note 1.

Whatever the reason, it seems clear that neither the Commission nor the court of appeals—nor even the Commission on the case's second appearance—either approved or disapproved the Club's use of the word "free" with respect to its book dividends. The Commission's dismissal of the latter charge was based on the finding that it was "not sustained by the evidence" and did not, therefore, purport to validate such advertising as not deceptive. All that the Commission decided was the issue presented in the *Black* case—whether an offer of bonus books to new members who agree to purchase a minimum quantity may be called "free." We do not believe, therefore, that the *Book-of-the-Month Club* case can be fairly represented as a deliberate holding by the Commission that an offer not limited to new members but open to any-

*Book-of-the-Month Club, Inc. v. F. T. C.*, 120 F. Supp. 718 (D. C. S. D. N. Y., 1954), 15 F. T. R. 1153 (1954), 30 F. T. R. 441 (1954). *Book-of-the-Month Club, Inc. v. F. T. C.*, 120 F. Supp. 718 (D. C. S. D. N. Y., 1954), 15 F. T. R. 1153 (1954), 30 F. T. R. 441 (1954).

one who purchased two books could be characterized as "free."

Respectfully submitted.

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